

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1922.

No. 378

874

ELIZABETH M. REILLY, APPELLANT,

vs.

WILLIAM P. CULLINANE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 28, 1922.

PRINTED APRIL 6, 1922.

Court of Appeals of the District of Columbia

JANUARY TERM, 1922.

No. 3787.

ELIZABETH M. REILLY, APPELLANT,

vs.

WILLIAM P. CULLINANE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3787.

ELIZABETH M. REILLY, Appellant,

vs.

WILLIAM P. CULLINANE.

a Supreme Court of the District of Columbia.

In Equity.

No. 37834.

ELIZABETH M. REILLY, Plaintiff,

vs.

WILLIAM P. CULLINANE, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Bill.

Filed May 5, 1920.

In the Supreme Court of the District of Columbia.

In Equity.

No. 37834.

ELIZABETH M. REILLY, Plaintiff,

vs.

WILLIAM P. CULLINANE, Defendant.

The plaintiff, Elizabeth M. Reilly, states to the Court as follows:
1. The plaintiff, who brings this suit in her own right, and the

defendant, William P. Cullinane, who is herein sued in his own right, are adults, citizens of the United States and residents of the District of Columbia.

2. Heretofore, to wit, on the 24th day of February, 1920, the defendant, in writing signed by him, and also by the plaintiff, entered into an agreement with the plaintiff in words and figures as follows:

“\$300.00.

February 24th, 1920.

Received of Elizabeth M. Reilly a deposit of Three Hundred and 00/100 Dollars, to be applied as part payment in the purchase of the North 21' of sub-lot 12, in square 73, improved by premises numbered 1025 22nd St., N. W. situated in the District of Columbia. The purchaser is required to make full settlement in accordance with the terms of sale within thirty days from date or as soon thereafter as the title has been examined and reported on, or the deposit will be forfeited.

Price of Property, Seventy-two Hundred & Fifty and 00/100 (\$7250.) Dollars.

Terms of Sale: All cash.

Property sold free of encumbrance. Subject to rights of occupants.

Title to be a good record title or deposit refunded. Revenue stamps on deed at cost of seller. Interest, rents, insurance, water rents and general taxes to be adjusted to date of transfer. Taxes and assessments, whether levied or not, for special improvements already made, to be paid by the seller. Examination of title and conveyancing at the cost of purchaser. This contract is made subject to approval by the owner.”

The defendant was then the owner of said property and as such he then approved said agreement.

In part performance of said agreement, the plaintiff then paid to the defendant and he then accepted and thereafter retained the sum of \$300.00, mentioned in said agreement.

3. The said sale was made by the defendant through his agent, Mr. James F. Shea, by whom said written agreement was drafted and prepared, and with whom the plaintiff then left said written agreement for use by him as her agent in obtaining a loan on said property. Thereafter at said Shea's request, she deposited with him \$30.00 on account of the expenses of examination of title and conveyancing under said agreement. Thereafter, to wit, on the 8th day of March, 1920, the defendant informed the plaintiff that he had received an offer of \$8,000.00 for said property, and that his wife refused to join in the conveyance to the plaintiff, pursuant to his written agreement aforesaid, unless he would invest the proceeds of the sale in other real estate, and that therefore he would not perform said agreement; whereupon the plaintiff, through her attorney, Mr. J. Wm. Shea, requested the said James F. Shea to return said written agreement to her, but he says he gave it to the defendant, and the plaintiff, to whom it rightfully belongs, now here calls upon the defendant to produce it in this Court.

4. Copies of papers relating to said transaction are filed with and made part of this bill and marked Exhibits, respectively, as follows:

3

- Exhibit 1. Letter, Feb. 25, 1920, James F. Shea to Plaintiff.
" 2. Receipt Feb. 26, 1920, James F. Shea for \$30.
" 3. Letter, March 11, 1920, J. Wm. Shea to James F. Shea.
" 4. Letter, March 24, 1920, James F. Shea to J. Wm. Shea.
" 5. Letter, April 6, 1920, J. Wm. Shea to James F. Shea.
" 6. Letter, April 7, 1920, James F. Shea to plaintiff.
" 7. Letter, April 8, 1920, J. Wm. Shea to James F. Shea.
" 8. Letter, April 17, 1920, James F. Shea to Mr. Sylvester Reilly.

5. The plaintiff and her husband, Sylvester Reilly, aforesaid, have occupied said property, which is improved by a dwelling house thereon, as their home under a contract of tenancy from month to month, ever since some time in February, 1913. As such tenant, the said Sylvester Reilly paid rent at the rate of \$42.50 per month until August, 1919, and since then at the rate of \$52.50 per month as required by the defendant. All said rent was paid to and received by the said James F. Shea as agent of the defendant.

6. Ever since some time during or about the month of July, 1919, the defendant has been endeavoring to sell said property through many agents. The plaintiff is informed and believes, and so charges that if the defendant's wife refuses to join in said conveyance by him, it is only because of his unwillingness to accede to the reasonable condition aforesaid on which she is willing so to join and that the true reason for his refusal to perform his said agreement is in the fact that he has received an offer of a larger sum from some other person.

7. The plaintiff is informed and believes that said property is now encumbered by two deeds of trust in the sum of \$4,500.00, and she is ready, able and willing, and hereby offers to fully and completely perform said agreement, or in the alternative, if the defendant so elect, she offers and is ready, able and willing to take and pay for a conveyance as provided by the agreement excepting as to the dower interest of defendant's wife upon the abatement by him of the value of such dower interest of his wife from the agreed purchase price to be paid by the plaintiff, or in case the Court find that his wife's refusal to join in such conveyance is in good faith, then, and in that event, the plaintiff hereby offers to accept a conveyance by the defendant alone, without joinder by his wife, and to pay therefor the said purchase price, provided the plaintiff be given such indemnity as the Court shall direct against right of dower and other encumbrance.

8. Considering the difficulties in efforts to obtain homes in said City, the labor and expense of removal from one home to another, the continuing increase in the purchase price of homes and other conditions, the plaintiff, without the relief herein prayed, will suffer irreparable loss and is without adequate remedy at law.

Wherefore, the plaintiff prays as follows:

1. That process issue requiring the defendant, William P. Cullinane, to appear herein and answer this bill.

2. That pending this suit, the defendant be restrained and enjoined from making or permitting to be made any conveyance of, or encumbrance upon said property, impairing the plaintiff's rights in the premises.

3. That the defendant be required specifically to perform said written agreement on his part to be performed upon the plaintiff's performance thereof on her part to be performed.

5 4. In case the Court refuse to require specific performance as aforesaid, then, in the alternative, that the defendant be required, upon performance by the plaintiff, of the said written agreement on her part to be performed, to convey to the plaintiff, in fee simple, the said property, with a good record title, excepting his wife's right of dower therein, and to give to the plaintiff such indemnity as the Court shall deem just and reasonable against said right of dower.

5. That such other and further relief be granted to the plaintiff as Equity may require.

ELIZABETH M. REILLY.

J. WM. SHEA,
LORENZO A. BAILEY,
Counsel for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I, Elizabeth M. Reilly, do solemnly swear that I have read the foregoing bill of complaint by me subscribed and understand the contents thereof and that the statements therein contained are true as I verily believe.

ELIZABETH M. REILLY.

Subscribed and sworn to before me this 4 day of May, A. D., 1920.
[SEAL.]

J. WM. REILLY,
Notary Public, D. C.

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EXHIBIT 3.

Filed May 5, 1920.

March 11, 1920.

James F. Shea, Esq.,
643 Louisiana Ave. N. W., City.

DEAR SIR:

Confirming what I had to say over the phone Tuesday to your Mr. Borger, I have to say that Mrs. Elizabeth M. Reilly insists upon the performance of Mr. Cullinane's contract for the conveyance to her of the property known as No. 1025 22nd St., N. W. Mr. Cullinane's explanation of his effort to withdraw from his obligation is that Mrs. Cullinane refuses to join in the deed because Mr. Cullinane will not invest the proceeds of the sale of this property in a home

for Mrs. Cullinane. It is therefore obvious that the difficulty is one which Mr. Cullinane can remove.

At any rate, I rely upon you to bring this matter to his attention with notice that Mrs. Reilly will seek her remedy in the Court if necessary, and that she stands ready, able and willing to perform her part of the contract.

Yours very truly,
(Signed)

J. WM. SHEA.

7

EXHIBIT 4.

Filed May 5, 1920.

James F. Shea,
Real Estate, Loans, and Insurance,
Washington, D. C.

March 24th, 1920.

Mr. J. Wm. Shea,
Columbian Bldg.,
Washington, D. C.

DEAR SIR:

Your letter regarding the sale of 1025 22nd St., N. W., has been forwarded to Mr. G. P. McGlue of 503 E St., N. W., to whom, we are informed, Mr. Wm. P. Cullinane has referred the matter.

Yours very truly,

(Signed)

JAMES F. SHEA,
By GEO. I. BORGER.

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EXHIBIT 5.

Filed May 5, 1920.

April 6, 1920.

James F. Shea, Esq.,
City.

DEAR SIR:

Please let me have the contract between Mr. Cullinane and Mrs. Reilly on which he endorsed his approval as owner and referred to in your letter of Feby. 25, 1920, to Mrs. Reilly. That paper should have been handed to her at the time, but she left it with you on the supposition that as her agent in obtaining the loan you might have use for it in that connection.

In accordance with the advice of counsel, Mrs. Reilly will pay no more rent to Mr. Cullinane, who has no longer the right to claim it from her.

Mrs. Reilly hereby now again tenders the purchase money upon delivery to her of proper deed conveying the title stipulated in the contract; or if Mrs. Cullinane persists in her refusal to join in the

deed, Mrs. Reilly will accept the conveyance by Mr. Cullinane, who will have to abate accordingly the value of the dower interest then remaining outstanding.

Yours very truly,
(Signed)

J. WM. SHEA.

EXHIBIT 8.

Filed May 5, 1920.

James F. Shea,
Real Estate, Loans, and Insurance,
Washington, D. C.

April 17th, 1920.

Mr. Sylvester Reilly,
1025 22nd St. N. W.,
Washington, D. C.

DEAR SIR:

I beg to advise you that the rent of premises 1025 22nd St., N. W., for the month of April is still unpaid. I understand that this rent is being held up on account of the question of the sale of the property to Mrs. Reilly. The property was rented to you personally and it seems to me that they are two separate matters which should be handled separately. In view of our heretofore satisfactory relations I should regret being compelled to take any action against you on account of this rent, but of course the matter can not be allowed to drift along indefinitely in this way. May I ask you therefore to let me know by Monday just what you will do in regard to this rent, and oblige,

Yours very truly,
(Signed)

JAMES F. SHEA.

Answer of William P. Cullinane to Bill.

Filed June 9, 1920.

* * * * *

For answer to the bill of complaint filed herein by Elizabeth M. Reilly, the defendant, William P. Cullinane, answering so much thereof as he is advised that it is necessary for him to answer, answering says:

1. He admits the allegations contained in paragraph one of the bill of complaint.

2. Answering the allegations contained in paragraph two of the bill of complaint he denies that on the 24th day of February, 1920 the defendant, in writing signed by him, entered into an agreement with the plaintiff as set out in said paragraph. He admits that on

the 24th day of February, 1920, he was the owner of the property described in the bill of complaint, but denies that he approved said contract except as hereinafter stated. He denies that the plaintiff paid to him the sum of Three Hundred (\$300.00) Dollars as a deposit, and that he retained the same.

3. He admits that James F. Shea was his agent for the purpose of securing a purchaser for said property, and that the written agreement mentioned by the plaintiff was drafted by said James F. Shea, and he denies that said written agreement was left by the plaintiff with James F. Shea for the purpose of obtaining a loan on the property. On the contrary said written agreement was left by defendant with James F. Shea for the purpose of securing the approval of this defendant. He admits that she deposited with James F. Shea the sum of thirty (\$30.00) Dollars on account of expenses of title

11 and conveyancing, but avers that in doing so the plaintiff constituted the said James F. Shea her agent for that purpose and that this defendant had nothing to do with that part of the transaction. He admits that on or about the 8th day of March, 1920, the defendant informed the plaintiff that he had received an offer of Eight Thousand (\$8000.00) Dollars for said property, but avers that he stated to her at that time that his wife would not join in a conveyance even for that price, and did not state that his wife had refused to join in a conveyance to the plaintiff because of said offer of Eight Thousand (\$8000.00) Dollars. He admits that he said that his wife would not join in a conveyance unless he would reinvest in real estate and he did inform the plaintiff that he could not therefore approve the sale of the property to her. He has no knowledge as to whether the plaintiff, through her attorney, J. W. Shea, requested said James F. Shea to return said written agreement to her.

4. He has no personal knowledge of the letters referred to in paragraph four, except that knowledge which he has received from reading the copies submitted to him and except as hereinafter referred to by him.

5. Answering the allegations contained in paragraph five of the bill of complaint, he admits that the plaintiff and her husband, Sylvester Reilly, had occupied said property, which is improved by a dwelling house, as their home under a contract of tenancy from month to month, but avers that the contract is between James F. Shea and Sylvester Reilly and not with the plaintiff. He admits that Sylvester Reilly paid the rent of \$42.50 and \$52.50 per month, and that said rent was paid to and received by James F. Shea as agent for the defendant, and for that purpose and that purpose only.

12 6. Answering the allegations contained in paragraph six of the bill of complaint defendant admits that said property was on the market for sale about the month of July, 1919, and that he had been endeavoring to sell the same through a number of agents, but avers that about September, 1919 he decided not to sell said property. He denies that his wife refuses to join in said conveyance because of the fact that he has received an offer of a larger

sum for said property from some other person, but on the contrary he avers that his wife refused to sign a deed even if a larger offer were made.

7. Answering the allegations contained in paragraph seven of the bill of complaint, the defendant denies that said property is now encumbered by two deeds of trust in the sum of Forty-five Hundred (\$4500.00) Dollars, but on the contrary he avers that said property is only encumbered by one deed of trust securing an indebtedness of Thirty-five Hundred (\$3500.00) Dollars, and he avers that his wife is not willing to join with him in a deed for the sale of said property, and is advised that even if the Court should hold that a valid contract existed he cannot be required to abate the purchase price to the amount of the dower interest of his wife, nor can he be required to give the plaintiff indemnity against such right of dower of the wife.

8. Answering the allegations contained in paragraph eight of the bill of complaint he denies that the plaintiff is without adequate remedy at law and that she will suffer irreparable loss if the relief prayed for is not granted.

And further answering the allegations contained in the bill of complaint, this defendant says that on or about January, 13 1919, he placed said property for sale with a number of real estate agents, the purchase price named being Seventy-seven Hundred Fifty (\$7750.00) Dollars; that during the month of September, 1919, he decided not to sell said property, but neglected to notify the agents to that effect; that on or about February 25, 1920, James F. Shea, with whom said property had been placed for sale for the sum of Seventy-seven Hundred Fifty (\$7750.00) Dollars, called the defendant on the telephone and asked him to come to see him as he had an offer for the property. When he reached the office of James F. Shea he was informed that he had an offer from the plaintiff for Seventy-two Hundred Fifty (\$7250.00) Dollars. This defendant finally stated that he would accept that offer and would approve the sale; whereupon he did approve the sale by signing his name to the contract. Leaving the office of James F. Shea he returned home immediately and informed his wife of the action taken by him, whereupon she informed the defendant that she would not join in a conveyance of the property. Defendant immediately called the office of James F. Shea and talked with George I. Borger, a salesman in the office who had made the sale, and informed Mr. Borger that defendant's wife would not join in the conveyance. Mr. Borger stated to this defendant that he had written a letter to the plaintiff informing her that the sale had been approved, but that said letter had not yet been placed in the mail. Defendant thereupon instructed George I. Borger not to mail said letter as he would be unable to approve the sale for the reason that his wife would not join in a conveyance of the property. The next day he saw Mr. Borger about the matter and was informed that Mr. Borger had overlooked the matter of the letter written by him, and had allowed it to be mailed. Defendant thereupon instructed Mr. 14 Borger to inform the plaintiff that the letter had been inadvertently sent out and instructed Mr. Borger not to deliver

the contract to the plaintiff. Mr. Borger thereupon mailed the contract to this defendant, who destroyed it.

This defendant avers that while he signed said contract he withdrew it within an hour after signing it; before any injury could have resulted to the plaintiff; before it left the hands of his agent; before the plaintiff had any notice of its approval, and that in fact it never was delivered to the plaintiff and could not properly have been delivered to her, and he is advised that in fact no contract ever existed between him and the plaintiff for the sale of the property.

Defendant avers that thereafter he was informed by James F. Shea that the plaintiff was not satisfied and was requested by Mr. Shea to accompany Mr. Borger to the home of the plaintiff for the purpose of talking over the matter; that at said interview he informed the plaintiff that his wife would not join in a conveyance of said property and that an offer of Eight Thousand (\$8000.00) Dollars had been made, but even at that price his wife would not join in a conveyance, and since that time this defendant has not seen the plaintiff nor has he had any communications from her. This defendant has always maintained that no contract existed between him and the plaintiff, and that the notice from the office of James F. Shea to the plaintiff, advising that the contract had been approved was sent out through a mistake of fact, and the plaintiff had full knowledge of that fact within a short time after the receipt
15 of said letter.

And having fully answered, the defendant prays to be hence dismissed with his reasonable costs.

WM. P. CULLINANE.

G. PERCY McGLUE,
Attorney for Deft.

I do solemnly swear that I have read the foregoing answer signed by me, and know the contents thereof; that the matters and things therein stated on personal knowledge are true, and the matters and things therein stated on information and belief I believe to be true.

WM. P. CULLINANE.

Subscribed and sworn to before me this 8th day of June, 1920.

[SEAL.]

GRACE SHROPSHIRE,
Notary Public, D. C.

Memorandum of Court.

Filed December 14, 1921.

* * * * *

In view of the language of the Court of Appeals in *Bride v. Reeves*, I do not think that the plaintiff can obtain the relief sought.

If the plaintiff desires the case will be transferred to one of the Circuit Courts.

JENNINGS BAILEY,
Justice.

Decree.

Filed December 16, 1921.

* * * * *

This cause coming on to be heard upon the pleadings and the testimony offered by the plaintiff, upon motion made by counsel for the defendant it is by the Court, this 16th day of December, 1921, adjudged, ordered and decreed,

That the bill of complaint filed herein be, and it is hereby dismissed with costs against plaintiff, without prejudice to the right of the plaintiff, within ten days from the date hereof, to apply to the Court for transfer of this cause to the law side of the Supreme Court of the District of Columbia for trial of such issues as may be properly presentable in said Court.

JENNINGS BAILEY,
Justice.

From the above decree the plaintiff in open Court notes an appeal to the Court of Appeals of the District of Columbia, and the Court thereupon fixes the amount of the undertaking on appeal at One Hundred Dollars, with the privilege of depositing Fifty Dollars in cash with the Clerk of the Court in lieu of such undertaking.

JENNINGS BAILEY,
Justice.

Memoranda.

December 16, 1921.—\$50 deposited by plaintiff's attorney in lieu of Appeal Bond.

17 January 20, 1922.—Time to submit Statement of Evidence extended to February 15, 1922.

February 9, 1922.—Statement of Evidence signed and filed.

Assignment of Errors.

Filed February 9, 1922.

* * * * *

The plaintiff is advised and so states for her assignment of errors that in and by the decree herein rendered on the 16th day of December, A. D., 1921, the Court erred as follows:

1. In sustaining the motion to dismiss.
2. In dismissing the bill of complaint.
3. In refusing to find, upon the pleadings and testimony, that the plaintiff is entitled to relief as prayed in the bill.

L. A. BAILEY,
Attorney for Plaintiff.

Designation of Record.

Filed February 9, 1922.

* * * * *

The Clerk will please prepare the transcript of record on appeal and include therein the following:

1. Bill of Complaint, with Exhibits 3, 4, 5 and 8.
2. Answer to bill.
3. Decree of December 16, 1921, and order as to appeal.
- 18 4. Memo. showing deposit in lieu of undertaking on appeal; filing of statement of evidence and order extending time for filing same.
5. Assignment of errors.
6. This order.

L. A. BAILEY,
Attorney for Plaintiff.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 18, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 37834 in Equity, wherein Elizabeth M. Reilly is Plaintiff and William P. Cullinane is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of February, 1922.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

20 In the Supreme Court of the District of Columbia, Holding
an Equity Court.

In Equity.

No. 37834.

ELIZABETH M. REILLY, Plaintiff,

vs.

WILLIAM P. CULLINANE, Defendant.

Statement of Evidence.

Be it remembered, That in the Supreme Court of the District of Columbia, before the Honorable Jennings Bailey, one of the Justices of said Court, on the 7th day of December, A. D. 1921, this cause, In Equity, No. 37834, wherein Elizabeth M. Reilly is plaintiff and William P. Cullinane is defendant, came on to be heard upon the bill of complaint and the answer thereto and evidence then adduced in open Court and hereinafter set forth, whereupon the plaintiff, a witness in her own behalf, testified as follows:

I am the wife of Sylvester Reilly. On February 24, 1920, I went to the office of Mr. James F. Shea with \$300. to deposit on the property in question and Mr. George I. Borger, a salesman in Mr. Shea's office, received the deposit and wrote the contract which I signed and he gave me a copy of it to take home, which copy is as follows:

James F. Shea,
Real Estate, Loans, and Insurance,
643 Louisiana Avenue N. W.,
Washington, D. C.

Telephone, Main 350.

\$300.00.

February 24th, 1920.

Received of Elizabeth M. Reilly a deposit of Three Hundred and 00/100 Dollars, to be applied as part payment in the purchase of the North 21' of sub lot 12, in square 73, improved by premises numbered 1025 22nd St., N. W. situated in the District of Columbia. The purchaser is required to make full settlement in accordance with the terms of sale within thirty days from date or as soon thereafter as the title has been examined and reported on or the deposit will be forfeited.

21 Price of Property Seventy-two Hundred & Fifty and 00/100 (\$7250.) Dollars.

Terms of Sale: All Cash.

Property sold free of encumbrance. Subject to rights of occupants. Title to be a good record title or deposit refunded. Revenue stamps on deed at cost of seller.

Interest, rents, insurance, water rents and general taxes to be adjusted to date of transfer.

Taxes and assessments, whether levied or not, for special improvements already made, to be paid by the seller.

Examination of title and conveyancing at the cost of purchaser.

This contract is made subject to approval by the owner.

JAMES F. SHEA,
Agent,

(Signed)

By GEORGE I. BORGER.

Approved by

(Signed)

ELIZABETH M. REILLY,

Purchaser.

_____,
Owner.

(Witness, resuming:) That is my signature down in the corner. Mr. Borger said he would let Mr. Cullinane know about the deposit. The next day I received the following letter:

February 25th, 1920.

Mrs. Elizabeth M. Reilly,
1025 22nd St. N. W.,
Washington, D. C.

DEAR MADAM:

Beg to inform you that the sale to you of premises 1025 22nd St., N. W., has been approved by the owner thereof. Please call at the office tomorrow, bringing with you \$30.00 as a deposit to be applied on account of the expenses of transferring the property, and oblige,

Yours very truly,

(Signed)

JAMES F. SHEA,
By GEO. I. BORGER.

(Witness, resuming:) The next day, February 26, I went to Mr. Shea's office and gave him the \$30. and he signed and gave me a receipt therefor as follows:

Washington, D. C., Feby. 26, 1920.

22 Received of Mrs. Reilly thirty dollars, as a deposit on a/c
of Title Expenses in purchase of premises No. 1025 22nd St.
N. W.

(Signed)

JAMES F. SHEA.

(Witness, resuming:) On April 8, 1920, I received the following letter:

April 7th, 1920.

Mrs. Elizabeth M. Reilly,
1025 22nd Street N. W.,
Washington, D. C.

DEAR MADAM :

Enclosed herewith is check for \$300.00 being return of deposit on 1025 22nd St., N. W.

Am also sending you check for \$30.00, the amount deposited with me for title expenses, examination of the title having been discontinued without cost.

Yours very truly,

(Signed)

JAMES F. SHEA,
By GEORGE I. BORGER.

(Witness, resuming:) The same day, April 8, my attorney returned the two checks to Mr. Shea with a letter stating as follows:

April 8, 1920.

James F. Shea, Esq.,
Washington, D. C.

DEAR SIR :

On behalf of Mrs. Elizabeth M. Reilly I return to you herewith enclosed your two checks for \$300. and \$30 respectively, payable to her order, which you sent her with your letter of the 7th instant. It might appear that your letter was the result of my letter to you dated April 6, 1920, then received on your behalf by Mr. McGlue. I am still awaiting your response to my letter above mentioned.

Yours very truly,

J. WM. SHEA.

(Witness, resuming:) I first moved into that house and made it my home about September 12, 1912. During the first part of February, 1920, before I made the deposit, Mr. Borger came to the house with some people and insisted on carrying them through. He said Mr. Cullinane wanted to sell it and Mr. Shea had it for sale. I asked him to give me until the first of the coming week that I might consider the house myself. He said he had a buyer for the house and was offering it to him for \$7250. I told him I did not like to be disturbed because it was so difficult to find a home. He came again on the following Friday and offered me the house for the same price, \$7250. I told him I had \$2750. cash and he said, representing Mr. Shea, that they would get for me the other \$4500. as a loan on the property. On the following Monday, February 24, I went to Mr. Shea's office and made the deposit and signed the contract. When I paid Mr. Shea the \$30. he said they had written for the money. The next that happened was about three weeks later, Monday, March 8, when Mr. Borger and Mr. Culli-

nane came to me and Mr. Cullinane told me that his wife would not sign the contract. I asked him why and if he didn't know that before the house was advertised. He said it was because she wanted him to invest the money I would give him for the house in a home for her. I asked him why he didn't do that. He said he didn't feel like buying any other property at the present time. I asked him if Mrs. Cullinane would live in this house. He said No. He also said another offer had been made for the house, \$8,000.

Upon cross-examination the witness testified as follows:

My husband is a tenant in the house and we have lived there since 1913 and are still living there. I first knew Mr. Cullinane shortly after we moved into the house. I knew he was married when the contract was signed. The house was advertised for \$7750, but Mr. Borger said he was making a special price of \$7250. for the man whom he brought to see the house, and that he would arrange the same price for me. It was understood that Mr. Borger was to
24 get Mr. Cullinane to approve the contract, but I never received the contract with Mr. Cullinane's signature on it. As to whether or not Mr. Cullinane received the deposit I can only answer by referring to Mr. Shea's letter. When Mr. Borger and Mr. Cullinane called on me March 8th, Mr. Cullinane stated that he was sorry the contract could not be carried out, and he wanted me to come to Mr. Shea's office to take back my deposit. I told him I did not like the way he was doing business. He may have said his wife would not sign for \$8,000, but I don't remember that he did, and I don't deny that he did. Mr. Cullinane stated that he would give me a lease of the property for one year at the same rent I was then paying.

The admission in evidence of the contract and the letters from James F. Shea were objected to by the defendant for the reason that it had not been shown that James F. Shea had any authority as agent other than the authority to secure a purchaser. The receipt for \$30.00 was admitted by the Court only upon the ground that it tended to show that the complainant had tried to comply with her contract.

Thereupon the plaintiff rested, whereupon the defendant moved the Court to dismiss the bill of complaint and the cause was argued by counsel, whereupon the Court took said motion under advisement and adjourned the hearing, and thereafter, on the 16th day of December, 1921, the Court, by its decree, granted said motion and dismissed said bill of complaint, from which decree an appeal by the plaintiff was then and there prayed and noted in open Court, and thereafter counsel for the plaintiff presented to the Court the foregoing statement of evidence, in duplicate, and prayed the Court to approve the same, which is accordingly done this 9th day of February, A. D. 1922, nunc pro tunc.

JENNINGS BAILEY,
Justice.

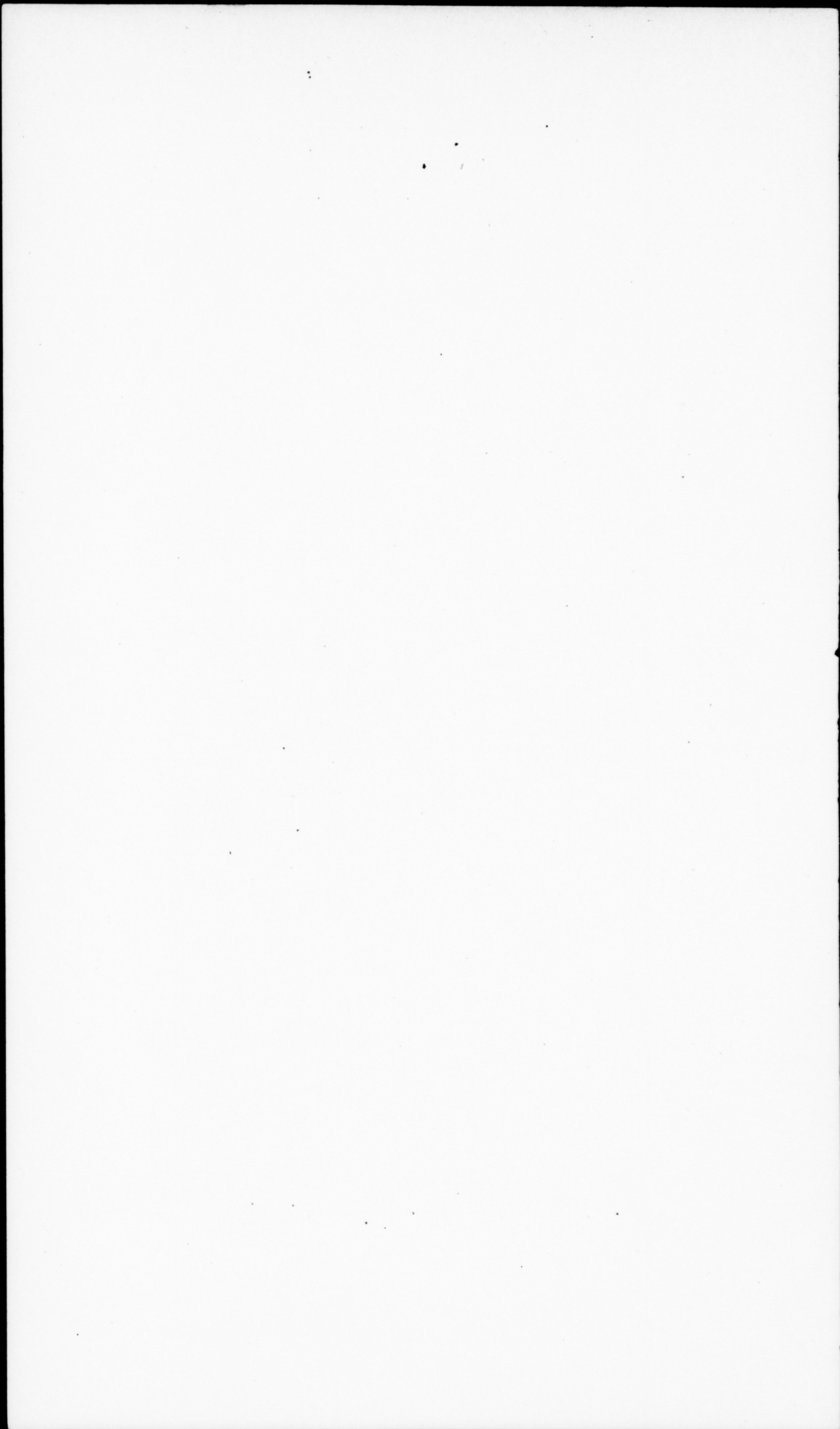
I consent.

G. P. McGLUE,
Atty. for Deft.

[Endorsed:] No. 37834. In Equity. Elizabeth M. Reilly, Plaintiff, vs. William P. Cullinane, Defendant. Statement of Evidence. (For Court of Appeals.)

Endorsed on cover: District of Columbia, Supreme Court. No. 3787. Elizabeth M. Reilly, appellant, vs. William P. Cullinane. Court of Appeals, District of Columbia. Filed Feb. 28, 1922. Henry W. Hodges, clerk.

(6005½)



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 7 - 1922

IN THE

Court of Appeals, District of Columbia

No. 3787.

ELIZABETH M. REILLY, *Appellant,*

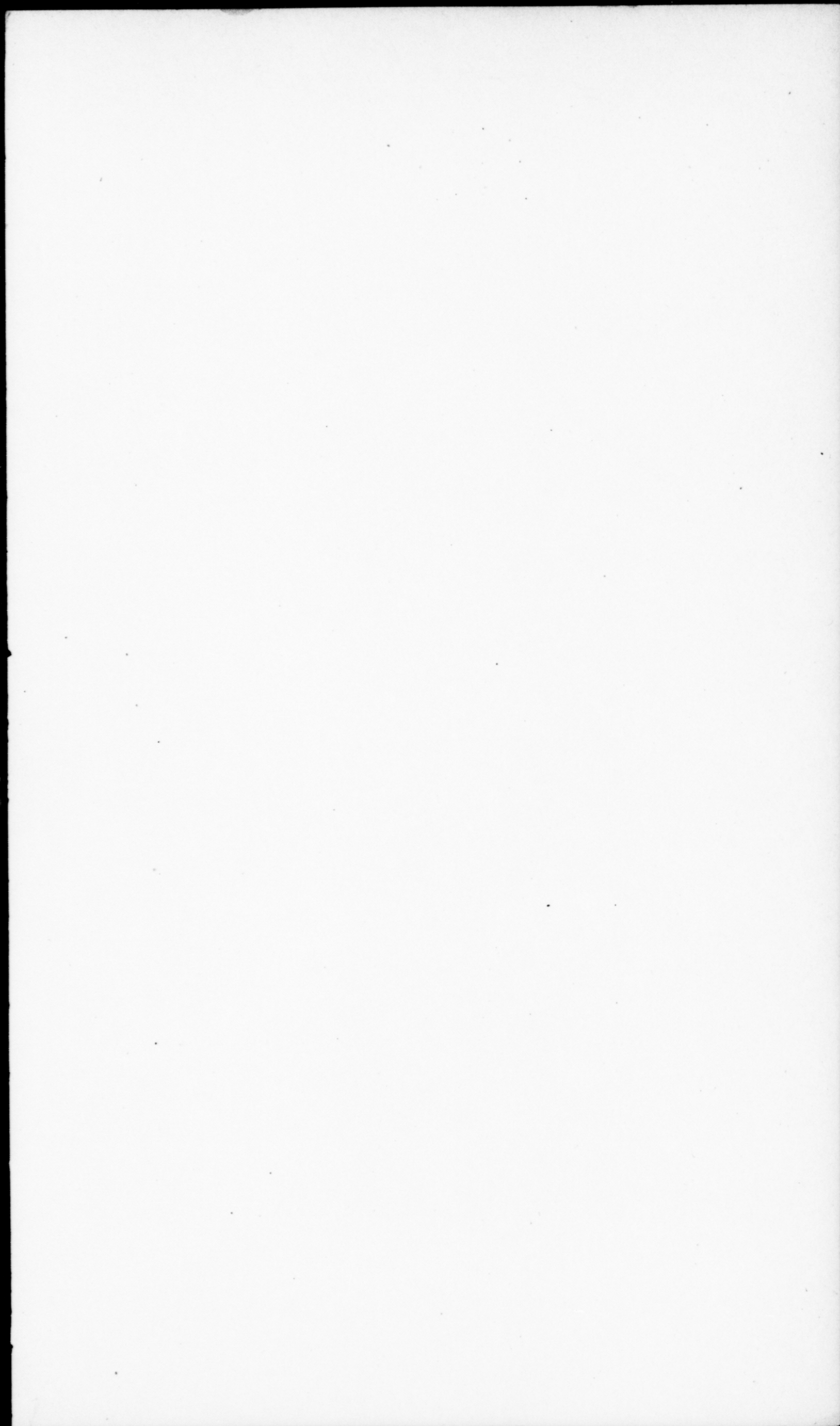
vs.

WILLIAM P. CULLINANE

Brief for Appellant.

LORENZO A. BAILEY,
J. WM. SHEA,

Counsel for Appellant.



IN THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

No. 3787.

ELIZABETH M. REILLY, *Appellant*,

vs.

WILLIAM P. CULLINANE.

BRIEF FOR APPELLANT.

In the Supreme Court of the District of Columbia the appellant was plaintiff and the appellee was defendant in a bill of complaint, filed May 5, 1920, seeking specific performance of a contract in writing, dated February 24, 1920, signed by the defendant as vendor and by the plaintiff as vendee, for the sale of certain real estate in said District.

At a hearing upon the bill, the answer thereto, and evidence adduced by the plaintiff, without any proof in support of the answer, the Court, by decree of December 16, 1921, dismissed the bill; from which decree the plaintiff has duly prosecuted this appeal.

The questions involved are as follows:

1. Under a written contract for sale of land with a good record title and free of encumbrance, to which contract the vendor's wife is not a party, should he perform reasonable conditions imposed by her in consideration of her joining in a conveyance under the contract? If so, were the conditions alleged to have been imposed in this case reasonable?

2. In a suit by the vendee seeking specific performance of such a contract is it a sufficient defense that the vendor's wife, who will not live in the house mentioned in the con-

tract and who wishes her husband to buy another house for her to live in, refuses to join in a conveyance under the contract unless he will buy such other house?

3. In such a suit, when the vendor alleges, as his sole defense, that his wife refuses to join in the conveyance, will such defense avail him without any proof of his wife's refusal?

4. In such a suit, upon such defense unsupported by proof, or supported by proof of such conditional refusal by the vendor's wife, should not the Court decree specific performance? Or, in such case should the Court decree conveyance subject to the dower right and on terms, by indemnity or otherwise, to protect the vendee?

The plaintiff in her bill alleged that twelve days after the date of the contract the defendant informed her "that his wife refused to join in the conveyance to the plaintiff, pursuant to the written agreement aforesaid, unless he would invest the proceeds of the sale in other real estate and that therefore he would not perform said agreement" (Rec. 2, par. 3), and the defendant, in his answer (Rec. 7) expressly admits the truth of that allegation and that he "did approve the sale by signing his name to the contract" (Rec. 8, par. 8).

The defendant's wife is not a party to the contract nor to the suit.

The bill prays, in the alternative, if the Court refuse to require specific performance, that the defendant be required to convey subject to his wife's dower right and to give suitable indemnity to the plaintiff against said dower right, and for general relief.

The evidence consisted of the testimony of the plaintiff, the contract and letters (Rec. 12-15), all tending to prove that the said real estate has been the home of the plaintiff ever since September 12, 1912; that the plaintiff signed the contract and then paid \$300 on account of the purchase price; that thereupon the defendant signed the contract and

left it with Mr. James F. Shea, who was his agent in making the sale and also the plaintiff's agent to get a loan on the property to be used as part of the purchase price; that two days thereafter the plaintiff deposited \$30 with Mr. Shea, at his request, on account of expenses of transferring the property; that on March 8, twelve days after the date of the contract, the defendant informed the plaintiff that his wife would not live in the house mentioned in the contract and would not sign the contract unless he would invest the money, the proceeds of the sale, in a home for her, which he would not do because "he didn't feel like buying any other property at the present time" (Rec. 15); that thereafter, April 6, the plaintiff informed the defendant that she would accept a conveyance from him alone if he would abate from the purchase price the value of his wife's dower interest then remaining outstanding (Rec. 5, 6).

At the close of the plaintiff's testimony and without any proof of or concerning the alleged refusal of the defendant's wife to join in the conveyance, the Court said in explanation of the decree, "In view of the language of the Court of Appeals in *Bride vs. Reeves* I do not think that the plaintiff can obtain the relief sought" (Rec. 9).

The plaintiff assigns error in dismissing the bill and in refusing to grant the relief prayed in the bill.

POINTS, AUTHORITIES, ARGUMENT.

I.

"It is a well settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

Macfarland *vs.* Barber Asphalt Pav. Co., 29 App. D. C., 506, 516.

By the contract Cullinane charged himself with the obligation to make conveyance free of his wife's dower right and his own averments show that it is possible for him to perform the contract in that respect. The only difficulty appears to be his unwillingness to gratify his wife's desire for a home and that is a difficulty which does not excuse him. In that respect this case is fundamentally different from the cases of *Barbour vs. Hickey*, 2 App. D. C., 207, and *Bride vs. Reeves*, 36 App. D. C., 476, cited by the defendant. Each of those cases was a suit by a vendee seeking specific performance of a contract, not signed by the vendor's wife, for the sale of land. In all other respects each of them differs from the case at bar and particularly in the fact that in each of them the wife was made a party defendant and specific performance was prayed as against her, whereas, in the case at bar the wife is not made party to the suit and no relief is prayed as against her or affecting her interests, but the obvious effect of the bill is to put the defendant to his proof as to his inability to convey clear of dower and if his inability be thus shown then, in the alternative, the bill seeks a conveyance which leaves the dower right outstanding and untouched.

In *Barbour vs. Hickey* the Court dismissed the bill on demurrer and on appeal this was affirmed on the ground of laches, no proper tender of performance by plaintiff or excuse for failure to make tender, disturbance of conjugal relations and that the remedy at law was adequate.

In *Bride vs. Reeves* the Court, on demurrer, dismissed the bill but on appeal this was affirmed as to the wife only upon the sole ground that she was not a party to the contract, and as to the other defendants the decree was reversed and the cause remanded for further proceedings in

which the Court, on bill, answer and testimony, dismissed the bill, and on appeal this was affirmed upon the grounds that the contract was not binding on the plaintiff, laches, and that enforcement of the contract would work hardship and injustice to the vendor. The vendor had no other property and occupied and used the property in question as a market garden for the support of his family. *Bride vs. Reeves*, 40 App. D. C., 473, 476, 479.

In *Barbour vs. Hickey* (p. 213), this Court mentioned as the main ground of its decision, "the want of right in the plaintiff to require the defendant Hickey to procure the joinder of his wife in the conveyance of the property, or to submit to a modification of the contract, and to have the contract specifically executed as modified," and (p. 214) quotes Story to the effect that the "stronger ground" is "the impolicy of endeavoring to compel the husband to use undue influence," etc. The case at bar contains none of these objectionable elements. The bill seeks no "disturbance of conjugal relations." On the contrary a decree for specific performance would require the defendant to gratify his wife's laudable desire for a home.

Both terms of the first question should therefore be answered in the affirmative.

II.

The second question should be answered in the negative. Specific performance should be granted or denied as equity and justice may demand in view of all the circumstances of the case.

Bride vs. Reeves, 40 App. D. C., 473.

III.

The third question should be answered in the negative. The plaintiff's statement in the bill of the reason stated to her by the defendant for his breach of the contract is not

an admission of the truth of the defendant's statement. The defendant in his answer renews his statement, that his wife is not willing to join in the conveyance, and makes it affirmative matter of defense which is deemed to be denied by the plaintiff, according to Equity Rule 40 of the Court below. It is for the defendant to prove, if he can, this matter of defense, for without such proof there is nothing to obstruct the plaintiff's right to a decree for specific performance.

IV.

The fourth question should be answered in the affirmative. If the defendant adduce such proof showing his wife's refusal to join to be a conditional refusal and if it appear possible for him to perform the condition, his contract obligates him to do so. *Luczak vs. Mariore*, 112 Alt., 494 (N. J.).

In *Barbour vs. Hickey*, *supra*, the alternative prayer (p. 211) was for conveyance subject to the contingent dower right and abatement by deduction of its value from the purchase price fixed by the contract. The Court (p. 215) said as to this, "To ascertain the value of such contingent right of dower would, necessarily, involve a controverted question of fact—a question that would likely elicit a variety of opinion and judgment; and when determined it would not be the agreement of the parties, but would be a distinct term introduced into the contract by the Court."

In *Bride vs. Reeves*, 36 App. D. C., 484, the Court, in sustaining the wife's demurrer, said "If she have a dower interest, plaintiff will take subject thereto. He cannot have an abatement of the purchase money to an amount equivalent to the value of the wife's contingent dower right," citing *Barbour vs. Hickey*, *supra*. This statement had no reference to the prayers of the bill and clearly recognizes the

power of the Court to require conveyance subject to the dower right but leaving the subject of indemnity undecided and not touched.

Indemnity was not mentioned in either of those cases. The Court may impose conditions to obviate hardship.

Willard *vs.* Tayloe, 8 Wall., 557.

V.

The plaintiff's allegations and proofs made out a clear case for specific performance. There is no proof that the defendant's wife refused to join in the conveyance. The defendant's admissions show that he can perform his contract and thus gratify the plaintiff and also his own wife.

The decree should be reversed.

LORENZO A. BAILEY,
J. WM. SHEA,
Counsel for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 30 1922

Henry W. Hodgson
Clerk

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

No. 3787.

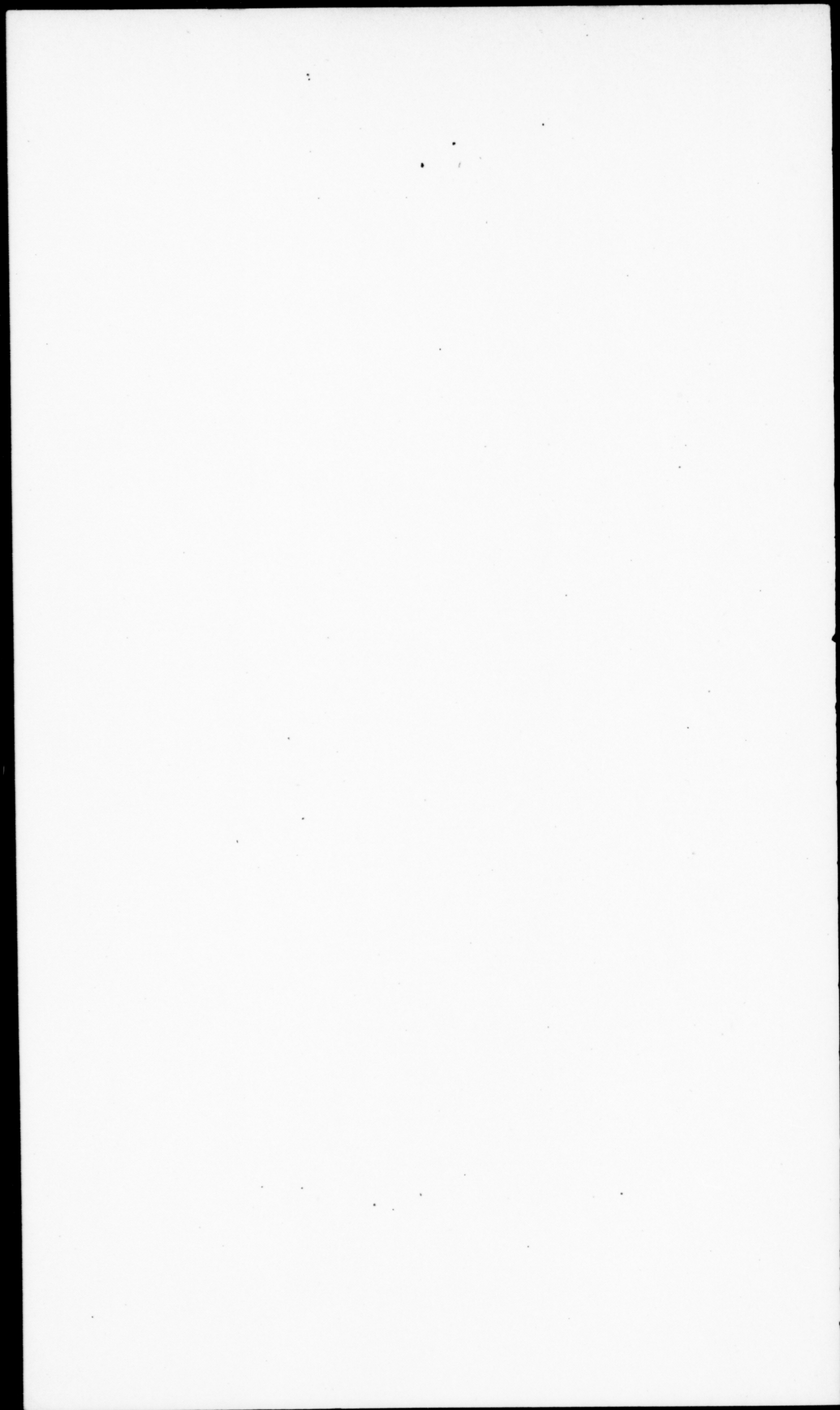
ELIZABETH M. REILLY, APPELLANT,

vs.

WILLIAM P. CULLINANE, APPELLEE.

BRIEF FOR APPELLEE.

G. PERCY McGLUE,
Counsel for Appellee.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 3787.

ELIZABETH M. REILLY, APPELLANT,

vs.

WILLIAM P. CULLINANE, APPELLEE.

BRIEF FOR APPELLEE.

Statement of Facts.

This proceeding was instituted by the appellant, plaintiff below, for specific performance of an alleged contract for the sale of certain real estate. The contract was made between the appellant and James F. Shea, a real estate agent, and was drawn by said James F. Shea, a copy thereof being set out in the bill, without the signatures of any of the parties thereto appearing thereon. It is averred by plaintiff that the contract was left with Mr. Shea for use by him as agent of the appellant in obtaining a loan. Thereafter the appellee informed appellant that his wife refused to join in a conveyance of the property and therefore he would not perform the agreement. Attached as exhibits to the bill were certain letters between said James F. Shea and appellant. In paragraph seven of the bill (see Record, page 3) appellant offers to take conveyance of the property without the conveyance of the wife, *upon the abatement of the value of the dower in said property of the wife, or provided plaintiff*

is given such indemnity as the court shall direct against the right of dower and other incumbrance.

The answer of the defendant admitted that James F. Shea was his agent *for the purpose of securing a purchaser for said property* and denied that the contract was left with James F. Shea for the purpose of obtaining a loan on the property, but was left with him for the purpose of securing the signature of the appellee. He averred that ~~he~~ signed the contract in the office of James F. Shea, but immediately returned home and informed his wife of his action, whereupon his wife informed him that she would not sign a conveyance of said property. Appellee immediately notified James F. Shea by telephone not to deliver said contract and not to inform the appellant that it had been approved.

At the trial the only witness offered was the appellant herself, who testified that she had made a deposit to George I. Borger, a salesman for James F. Shea, and had received the contract for the sale of the property from him (Rec., p. 12). She then offered in evidence the contract and certain letters between James F. Shea and herself. *The contract offered and said letters were all objected to* by counsel for appellee on the ground that it had not been shown that James F. Shea had any authority as agent other than to secure a purchaser (see Rec., p. 15). The defendant, in his answer, denied any knowledge of these letters until after the suit was filed. Appellant testified that the entire transaction had been with Mr. Borger, an employee of James F. Shea, and that about three weeks later Mr. Borger and the appellee told her that his wife would not sign the *contract*, and that she would not sign because she wanted him to invest the money in a home for her. On cross-examination she stated she had known Mr. Cullinane since about 1913, and knew that he was married when the contract was signed. She understood

that Mr. Borger was to get Mr. Cullinane to approve the contract, but she had never received the contract with Mr. Cullinane's signature on it.

Points, Authorities and Argument.

I.

Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.—————

It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement. *Waters vs. Ritchie*, 3 D. C. Appeals, 388.

In this case the only evidence offered by the appellant was evidence of her transactions with James F. Shea, or his employe, and letters from James F. Shea to her, and from her on her attorney to James F. Shea. The contract offered in evidence specifically provides, "This contract is made subject to approval by the owner." It does not bear the owner's approval, and no evidence was offered of the approval of this contract other than the letter of the agent. The appellant, in her brief, seeks to avoid this deficiency in the proof by calling attention to the admission in the answer of the defendant that he did approve the sale by signing his name to the contract. It is submitted that the appellant can not be permitted to take one part of the answer as an admission without taking the explanation in the answer which immediately follows appellee's admission of signing the contract, which was that he had withdrawn his signature and directed his agent not to deliver

the contract to the purchaser, as his wife had refused to sign same.

Appellant in her own testimony further said that Mr. Cullinane told her that his wife would not sign the *contract*. It therefore may be inferred that an attempt was being made to secure Mrs. Cullinane's signature to the contract, which was the proper thing to do if it was intended to cover her dower interest. The contract was never completed and never was delivered to appellant.

This court has so many times decided that the general authority of a real estate agent only authorizes him to secure a purchaser and not to make a contract that no citation of authorities is necessary, and certainly it needs no citation of authority to maintain the point that a vendor who delivers a contract to his own agent is not bound to the vendee until the agent has delivered the contract to the vendee. The possession of the vendor's agent is the possession of the vendor. It is submitted therefore that the appellant in the court below failed to make out a case for specific performance regardless of the questions arising by reason of the refusal of the wife of the vendor to sign the contract or a conveyance. Not only did she fail to make out a case in the matter of the signing of the contract by the vendor, but she failed to show, and it does not appear, that any tender was made or attempted to be made.

II.

This court has heretofore fully considered and passed upon the question of specific performance in cases where the wife refuses to join in the conveyance with her husband. *Barbour vs. Hickey*, 2 D. C. Appeals, 213; *Bride vs. Reeves*, 36 D. C. Appeals, 484. In the first named case the court said, "But there is more sub-

stantial ground for sustaining the demurrers than those to which we have referred; and that is the want of right in the plaintiff to require the defendant Hickey to procure the joinder of his wife in the conveyance of the property, or to submit to a modification of the contract, and to have the contract specifically executed as modified." In the same case the court further said, "It is insisted, however, that if the wife can not be required to join with her husband in the making of a deed, a decree should be made against the husband requiring him to convey, and that he should suffer an abatement of the purchase money to an amount equivalent to the value of the contingent right of dower in the property. But to do this would be simply modifying the contract, and decreeing its specific performance as modified. To ascertain the value of such contingent right of dower, would necessarily, involve a controverted question of fact—a question that would likely elicit a variety of opinion and judgment; and when determined it would not be the agreement of the parties, but would be a distinct term introduced into the contract by the court. Such method of dealing with the contract is not consistent with the equitable doctrine of specific performance. The court should either execute the contract as made by the parties, or decline the exercise of the jurisdiction altogether. Upon this subject we refer to the opinion of Chief Justice Gibson, in the case of *Clark vs. Seirer*, 7 Watts, 107. The remedy at law is adequate, and the plaintiff must be remitted to that remedy, if he desires redress."

The brief of appellant states that indemnity was not mentioned in either the case of *Barbour vs. Hickey*, or the case of *Bride vs. Reeves*. While that is a fact in so far as the opinion of the court is concerned, nevertheless the court must have considered the question of indemnity as it was referred to in the brief of the ap-

pellee in the case of *Barbour vs. Hickey* and reported in the case itself.

III.

Appellant maintains that if the wife's refusal to join in a deed is a conditional refusal, and it is possible for the husband to perform the condition, his contract obligates him to do so, and cites *Luczak vs. Mariore*, 112 Atlantic, 494, which is also reported in 92 New Jersey Equity, 377. This quotation is very misleading. In the first place New Jersey is one of the *few* states which permits abatement of the purchase price where the wife refused to sign and which permits indemnity in lieu of release of dower by the wife. But even in New Jersey it must be shown that there has been collusion between husband and wife, that the wife acted at the request of the husband, or that the husband secured her consent to refuse to join in the deed. Appellant offered no such proof in the trial of this case, and if this case had been heard in the State of New Jersey, would not have been entitled to the relief prayed. The citation of *Luczak vs. Mariore* is also misleading because in that case, after the contract was signed, the wife actually signed and acknowledged a deed to the purchaser and delivered the same to her husband, who had afterwards destroyed it. There was, therefore, plainly evidence in that case of collusion between husband and wife and of the willingness of the wife to join in a conveyance of the property. In that case also the court pointed out that the wife had taken an active and important part in the negotiations leading up to the contract of sale, going so far as to demand new conditions. It is submitted, therefore, that the case cited by appellant is in no wise applicable to the facts in the present case.

Even in New Jersey, in *Stone vs. Stanley*, 112 Atlantic, 496; also reported in 92 New Jersey Equity, 310, it was held that while it has been long recognized in that state that a court of equity will enforce specific performance to sell land, and may in its decree require that the purchase money be applied to pay outstanding liens or require indemnity from the vendor, neither indemnity not abatement from the purchase price should be decreed on account of any outstanding inchoate right of dower of the wife of the vendor, who has not joined in the contract and refused to join in the conveyance, unless it should be shown that the vendor induced the wife to refuse to release her dower, for otherwise, she might be coerced. The court said, "It is difficult to understand why any vendor, especially an attorney at law, will neglect to procure the signature of his vendor's wife to a contract of sale of land when he knows that his vendor is married, if specific performance is within his anticipated remedies. Indeed, in the English cases, and in many cases in this country, it is declared that in such circumstances the equitable remedy with indemnity or abatement is in no case available, although that view has not yet been adopted in this state." In the last-mentioned case the vendor's wife had refused to sign a deed, but stated that she would execute the deed provided her husband would purchase another home for her before they went away for the summer, and the husband failed to make such purchase. The court held that the vendee could not obtain specific performance with abatement or indemnity on account of the wife's inchoate right of dower, the condition not having been performed but the purchaser must seek relief by way of damages at law.

It is submitted that the facts and principles involved in the case of *Macfarland vs. Barber Asphalt Paving*

Company, 29 Appeals D. C., 506, 516, cited by appellant are not applicable to the case at bar.

IV.

The plaintiff failed to make out a case for specific performance, and this court has previously, in *Barbour vs. Hickey and Bride vs. Reeves*, passed upon the other questions involved.

The decree should be affirmed.

G. PERCY McGLUE,
Counsel for Appellee.

